

A Tay Lye Seng & Anor v Nazori bin Teh & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-51
OF 1996

SITI NORMA YAAKOB, ABDUL MALEK AHMAD AND DENIS ONG JJCA
20 JULY 1998

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Tort — Damages — Loss of earnings — Plaintiff working illegally in Singapore — Whether plaintiff could claim loss of earnings from illegal source — Whether claim against public policy — Whether there was element of culpability on the part of the plaintiff — Whether maxim ex turpi causa non oritur actio applied in tort

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The respondent was involved in a road accident. He claimed, inter alia, for loss of earnings against the appellant. The appellant contended that the claim for loss of earnings should be disallowed because at the time of the accident, the respondent was working illegally in Singapore as his work permit had expired four months earlier. It was contended that the maxim *ex turpi causa non oritur actio* applied as to bar the respondent from succeeding on his claim for loss of earnings as such claim was against public policy. The High Court judge allowed the respondent's claim. The appellant appealed. The issue before the court was whether a plaintiff in a personal negligence suit could claim as one of his damages, loss of earnings from an illegal source.

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Held, dismissing the appeal:

- (1) Based on authorities, it could be said that whilst public policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case. The authorities showed that where there is the element of culpability on the part of the plaintiff who claims for loss of earnings or that the claim flowed directly from the wrongdoing, the claim would fail. Where he is without fault, he may recover according to the usual principles of measure of damages (see p 878G-H).

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In the present case, the fact that the respondent had no valid work permit per se could not affect his claim for loss of earnings. This is so as the respondent was initially working legally in Singapore. He had a valid work permit issued by the Singapore authorities which expired four months before the accident. The obligation to renew the work permit lies with the respondent's employer and since there was no evidence that they had done so, the respondent had not been culpably responsible for the predicament that he had found himself to be in. Under these circumstances, the maxim *ex turpi causa non oritur actio* lacked moral justification and to that end was not applicable (see p 879G-I).

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- (2) The maxim has a limited application in tort. Its principal role lies mainly and most exclusively in actions on contract (see p 879I); *Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee,*

deceased) & *Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394 followed. A

[Bahasa Malaysia summary]

Penentang terlibat dalam suatu kemalangan jalan raya. Dia menuntut, antara lain, untuk kehilangan pendapatan terhadap perayu. Perayu menghujahkan bahawa tuntutan untuk kehilangan pendapatan tidak harus dibenarkan kerana pada masa kemalangan berlaku, penentang bekerja secara haram di Singapura oleh sebab permit kerjanya telah tamat tempohnya empat bulan lalu. Adalah diujahkan bahawa pepatah *ex turpi causa non oritur actio* terpakai hinggakan menghalang penentang daripada berjaya atas tuntutan untuk kehilangan pendapatan kerana tuntutan sedemikian bertentangan dengan polisi awam. Hakim Mahkamah Tinggi membenarkan tuntutan penentang. Perayu membuat rayuan. Isu di hadapan mahkamah adalah sama ada seseorang plaintif dalam guaman kecuaiannya sendiri boleh menuntut kehilangan pendapatan daripada sumber yang haram sebagai salah satu daripada ganti ruginya. B C D

Diputuskan, menolak rayuan:

- (1) Berdasarkan autoriti-autoriti, ia boleh dikatakan bahawa manakala polisi awam akan menewaskan apa-apa tuntutan yang berdasarkan kepenyalahan undang-undang, suatu imbalan hendaklah dibuat berasaskan fakta-fakta dan keadaan tertentu setiap kes. Autoriti-autoriti menunjukkan bahawa di mana terdapat elemen kebersalahan pada pihak plaintif yang menuntut kehilangan pendapatan atau bahawa tuntutan adalah berpunca secara terus daripada kesalahan, tuntutan itu akan gagal. Di mana ia tidak bersalah, ia boleh memperolehi tuntutan menurut prinsip-prinsip pengiraan ganti rugi yang biasa (lihat ms 878G-H). E F

Dalam kes ini, hakikat bahawa penentang tidak memiliki permit kerja yang sah per se tidak boleh menjejaskan tuntutan untuk kehilangan pendapatan. Ini adalah kerana penentang pada mulanya bekerja secara sah di Singapura. Dia memiliki permit sah yang dikeluarkan oleh pihak berkuasa Singapura yang tamat tempohnya empat bulan sebelum kemalangan berlaku. Kewajipan untuk membaharui permit kerja terletak dengan majikan penentang dan oleh kerana tidak terdapat keterangan bahawa mereka telah berbuat demikian, penentang tidak boleh dianggap bersalah atas kesusahan yang didapatinya. Di bawah keadaan-keadaan ini, pepatah *ex turpi causa non oritur actio* kekurangan justifikasi moral dan setakat itu tidak terpakai di sini (lihat ms 879G-I). G H

- (2) Pepatah tersebut terpakai secara terhad dalam tort. Peranan utamanya terletak dan secara eksklusif dalam tindakan berdasarkan kontrak (lihat ms 879I); *Chua Kim Suan* I

- A (Administratrix of the estate of Teoh Tek Lee, deceased) & Anor v Government of Malaysia & Anor [1994] 1 MLJ 394 diikut.]

Notes

- B For cases on damages, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 87–134.

Cases referred to

- C *Burns v Edman* [1970] 2 QB 541 (refd)
Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, deceased) & Anor v Government of Malaysia & Anor [1994] 1 MLJ 394 (folld)
Dhlamini en'n Ander v Protea Assurance Co Ltd 1974(4) SA 906(A) (refd)
Ooi Han Sun & Anor v Bee Hua Meng [1991] 3 MLJ 219 (refd)
D *LeBagge v Buses Ltd* [1958] NZLR 630 (refd)
Yaakub Foong v Lai Mun Keong & Ors [1986] 2 MLJ 317 (refd)

Appeal from: Civil Suit No 23–173 of 1993 (High Court, Johor Bahru)

- E *S Radhakrishnan (Shearn Delamore & Co)* for the appellants.
S Gunasegaran (John Ang & Jega) for the respondents.

Cur Adv Vult

- F **Siti Norma Yaakob JCA** (delivering judgment of the court): This appeal raises an interesting and important point of law. It is this. Can a plaintiff in a personal negligence suit claim as one of his damages, loss of earnings from an illegal source? Expressed in another way, to what extent does the maxim *ex turpi causa non oritur actio* apply in actions based on tort? That issue arose from the following undisputed facts.

- G The two respondents before us were the rider and pillion passenger of a motor cycle that were involved in a collision with a van driven by the first appellant, an agent of the second appellant. The accident happened near the 6th milestone along the Johor Bahru/Kota Tinggi road. In the court below, both respondents sued both appellants claiming general damages
H for the personal injuries sustained and special damages for other losses suffered. Although both appellants filed a joint statement of defence denying negligence on their part and put the cause of the accident solely on the negligence of the first respondent, at the trial, liability was conceded at 50:50, so also the general damages claimed by the first respondent at RM70,000 for pain and suffering and special damages at RM1,500. Claims
I for general and special damages by the second respondent were also agreed at RM13,000. That left only the question of two heads of special damages claimed by the first respondent to be decided, namely:

- (1) cost of nursing care; and
- (2) loss of earnings.

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It is in respect of the second head of special damages that we are most concerned with in this appeal, and in the court below, oral evidence was led by the first respondent and his two brothers to the effect that at the material time, the first respondent worked in Singapore as a labourer in a construction company known as Magsa Construction. Nobody from Magsa Construction testified on his behalf as the company was no longer in existence. In any event, from the oral evidence adduced, the learned trial judge was able to assess the first respondent's monthly income and after making the necessary calculations as seen at p 23 of the appeal record, he arrived at the total amount of S\$105,024 for loss of past and future earnings based on 100% liability.

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It is the appellants' contention that this claim for loss of earnings should be disallowed altogether as it is undisputed that at the time of the accident, the first respondent was working illegally in Singapore as his work permit had expired four months earlier. We have been told that the parties have accepted that at the time of the accident the first respondent had no valid work permit to work in Singapore. Since his earnings came from an illegal source, the appellants contend that the maxim *ex turpi causa non oritur actio* applies as to bar the first respondent from succeeding on his claim for loss of earnings as such claim is against public policy.

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This same issue has been discussed at great length by the then Supreme Court in the case of *Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, deceased) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394. In that case the deceased was killed in a motor accident and his administrators sued the defendants for loss to the estate including loss of earnings. The respondents admitted liability and damages were assessed by the registrar who refused to take into account the monthly income of RM1,500 earned by the deceased in running an unlicensed taxi. There was evidence to show that a taxi licence was issued in 1976 to the deceased's father, who died in 1977. Thereafter the taxi continued to be operated by the deceased under the father's licence until 1982 when the deceased himself died without ever applied for a taxi licence. This state of affairs was known by some of the Road Transport Department officers who never prosecuted the deceased in respect of it.

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The administrators appealed against the registrar's order but the appeal was dismissed by the High Court and the registrar's order was confirmed.

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On a further appeal to the Supreme Court, Peh Swee Chin SCJ (as he then was), after reviewing a number of common law authorities, had this to say (at p 401):

We have decided after most anxious consideration that any claim for loss of earnings from illegal source should not be allowed on the ground that it is against public policy. We think we would also follow, on this point, the decisions of *Ooi Han Sun*; *Burns*; *Lebagge* and *Dhlamini* and approve the dictum in question in *Yaakob*. We therefore uphold the decision of the

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- A learned judge in the court below and that of the learned registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operations of the taxi should be disallowed, because *ex turpi causa non oritur actio* or in other words, such claim would be against public policy. We would like to emphasize the timely caution of the learned Chief Justice of Singapore in *Ooi*, that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.
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In *Ooi Han Sun & Anor v Bee Hua Meng* [1991] 3 MLJ 219, the Singapore High Court had to deal with almost similar circumstances as that presented by the instant appeal before us. The first plaintiff was a Malaysian working in Singapore. At the time of the accident he was being transported to work on a motor pick-up driven by the defendant when the pick-up overturned. At that point of time had not been issued with a work permit from the Singapore authorities. The learned Chief Justice when assessing the loss of earnings claimed by the first plaintiff had this to say (at p 223):

- D ... As a rule of public policy, the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in the law of contract to prevent a plaintiff founding a claim on an illegal act or agreement. It is clear, however, that the maxim has only very limited application in tort and, in general, the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence: *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438 (folded); *National Coal Board v England* [1954] AC 403; [1954] 1 All ER 546 (folded); *Progress and Properties Ltd v Craft* (1976) 12 ALR 59 (folded); *Jackson v Harrison* (1978) 19 ALR 129 (folded). The only exceptions would appear to be the limited range of cases in which, on the facts of the case, an injury can be held to have been directly incurred in the course of the commission of a crime: *Godbolt v Fittock* (1963) 63 SR (NSW) 617; [1964] NSW 22 (refd) *Smith v Jenkins* [1970] 44 ALJR 78 (refd); *Ashton v Turner* [1981] QB 137; [1980] 3 All ER 870 (folded) *Pitts v Hunt & Anor* [1990] 3 All ER 344 (folded). ...
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While, therefore, the first plaintiff would not be precluded from claiming against the defendant in this case in spite of his being on his way to work without having a work permit at the time of the accident, the question has to be considered again from the point of view of the quantum of damages to which he is entitled, and in particular, whether and to what extent his illegal earnings in Singapore at the time of the accident might be used as a basis for calculating his pre-trial loss of earnings and his future loss of earnings. ...

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- H In my judgment, the assessment of the first plaintiff's loss of earnings should be based on an estimate, however difficult and imprecise this might be, of what he would have earned in Malaysia had there been no accident to him. The immigration laws and regulations which require work permits to be obtained by foreign workers before they can work in Singapore were not designed merely to raise a little extra revenue, but to implement a basic public policy. To compensate the first plaintiff on the basis of what he might have earned by working illegally in Singapore without a valid work permit would be against public policy and wholly improper.
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On that reasoning the first plaintiff's loss of earnings was assessed on what he would have earned in Malaysia if there had been no accident.

In *Burns v Edman* [1970] 2 QB 541, the deceased was killed in a motor accident and his widow claimed damages for loss of dependency. The court held that since the deceased's earnings were derived solely from the proceeds of crime which the widow was fully aware, she was not entitled to claim such damages on the basis that *ex turpi causa non oritur actio* applied.

In the New Zealand case of *LeBagge v Buses Ltd* [1958] NZLR 630, the issue raised was whether the deceased husband's infringement of certain regulations relevant to his trade of a milk float driver could defeat his widow's claim for damages. The Court of Appeal held it did not as the infringement was of minimal importance and it did not effect the milk contract under which the claim was based.

In the South African case of *Dhlamini en'n Ander v Protea Assurance Co Ltd* 1974(4) SA 906(A), the plaintiff who was an unlicensed hawker for 20 years was denied her claim for damages for income lost from selling fruit on the ground that such a claim was against public policy.

Lastly in the case of *Yaakub Foong v Lai Mun Keong & Ors* [1986] 2 MLJ 317, Shankar J (as he then was) had to deal with the claim of a Malaysian plaintiff working legally in Singapore. In assessing his earnings in Singapore, the court had also to consider the admissions that he paid no income tax to the Singapore authorities and that he did extra work in contravention of his work permit. The plaintiff contended that his admissions were not relevant in assessing his claim for loss of earnings. The learned judge held otherwise and expressed his view that had there been evidence of the amount of income tax due to the Singapore authorities and the amount he had illegally earned when contravening his work permit, he would have deducted such amounts from the earnings legally due.

In the light of the decided cases, we asked ourselves whether the learned trial judge in the instant appeal before us made the right finding of law when he decided that the first respondent could claim for his lost earnings in Singapore even though he had no valid work permit at the material time.

The Supreme Court's decision in *Chua's* case, and its approval of the decisions reached by the other common law jurisdictions in *Ooi Han Sun*, *Burns*, *LeBagge* and *Dhlamini* left us with the conclusion that whilst public policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case. In all the cases cited above, there is the element of culpability on the part of the plaintiff who claims for loss of earnings or support for the wrongdoing complained of or that the claim flowed directly from the wrongdoing. Where he is without fault, he may — it seems — recover according to the usual principles of measure of damages. Thus in *Chua's* case, the deceased never applied for a taxi licence when he was operating his taxi but instead assumed the one that was issued to his father but the licence was never transferred into his name during his lifetime. The deceased had committed an offence under s 126 of the then Road Traffic Ordinance 1958 and he could have been prosecuted and for this very reason the estate of the deceased could not benefit from his earnings of the use of the

A unlicensed taxi.

Likewise, *Burns* was decided on the basis that the widow was aware that her husband's earnings came directly from the profit of criminal offence. There was evidence that the deceased's husband had no capital assets to support his family or that he had any honest employment during his lifetime. He had been imprisoned for three years for robbery in 1954 and convicted four years later being an accessory before or after the fact to felony and sentenced to 21 months' imprisonment. Since the claim for support flowed directly from the criminal offence, that factor prevented the widow from succeeding on her claim.

C In *LeBagge's* case, however, the illegality related to the infringement of the Transport Licensing Regulations 1950 of New Zealand which forbade the deceased husband to drive his milk float truck seven days a week but confined him to six days' work. He did in fact earn an extra pound a week by driving on the seventh day. The Court of Appeal allowed the earnings to be calculated on seven working days and ruled that the action filed by the widow was not affected by illegality as it was too minor to affect the fulfilment of the milk contract which necessitated the deceased husband driving the milk float truck in the first place.

E In *Dhlamini's* case, the plaintiff was aware that she needed a licence to sell fruit as a hawker but her attempts on a number of occasions to obtain one had met with little success. Undaunted, she continued with her hawking trade for some 20 years without licence and under those circumstances public policy barred her from claiming damages for income lost.

F In *Ooi's* case, the High Court in Singapore whilst conceding that the first plaintiff cannot be precluded from claiming lost wages in spite of not being in possession of a work permit, viewed the matter in the light of what effect illegality had on the question of damages to be awarded. It then concluded that had the accident happened in Malaysia, the plaintiff would be entitled to claim for loss of earnings and on that basis calculated the amount due on earnings that he would have earned in Malaysia.

G Reverting to the circumstances of our instant appeal, we consider that the fact that the first respondent had no valid work permit, per se, cannot affect his claim for loss of earnings in Singapore. This is so as unlike *Chua's* case, the first respondent was working legally in Singapore initially. He had a valid work permit issued by the Singapore authorities but unfortunately that expired four months before the accident. We have been told that the obligation to renew the work permit lies squarely with the first respondent's employer and since there is no evidence that they had done so, we consider that the first respondent had not been culpably responsible for the predicament that he had found himself to be in. Under these circumstances, we consider that the maxim *ex turpi causa non oritur actio* lacked moral justification and to that end is not applicable to the instant appeal before us.

As to the maxim's application in actions based on tort, we echo what was said by the Supreme Court in *Chua's* case 'that the maxim has a

limited application in tort. The maxim's principal role lies mainly and most exclusively in actions on contract.' A

For the reasons appearing in this judgment, we see no reason to disturb the decision of the High Court and to that end we had dismissed the appeal with costs and ordered the deposit to be paid out to the respondents to account of their taxes costs. B

Appeal dismissed.

Reported by Jafisah Jaafar

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